

## **803 KAR 2:250. Discrimination.**

RELATES TO: KRS 338.015(7), 338.121, 338.991

STATUTORY AUTHORITY: KRS 338.051

NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051 requires the Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations. This administrative regulation establishes the procedure for discrimination complaints pursuant to KRS 338.121.

Section 1. Definitions. (1) "Commissioner" is defined by KRS 338.015(7).

(2) "Complainant" means any person who makes a complaint as defined by subsection (3) of this section.

(3) "Complaint" means any oral or written communication related to an occupational safety and health concern made by an employee to an employer, governmental agency, or made to the commissioner or the commissioner's designee.

(4) "Secretary" is defined by KRS 338.015(12).

Section 2. Procedure for Complaint to the Commissioner; Recipient of; Time for Filing; Form of Complaints. (1) An employee or former employee may file an oral or written complaint alleging discrimination with the commissioner or the commissioner's designee.

(2) A complaint shall be filed no more than 120 days from the occurrence of the alleged discriminatory activity.

(3) A complaint shall state the name and address of the complainant, name and address of employer, and description of alleged discrimination.

(4) Notification shall be given to the employer of the receipt by the commissioner of a complaint within five (5) working days.

Section 3. Settlement. Settlement is encouraged at any stage of the proceedings if the settlement is consistent with the provisions and objectives of KRS Chapter 338. Primary consideration shall be the reinstatement of a complainant to his or her former position with back pay and assurance of the future protection of the rights of all employees under KRS Chapter 338.

Section 4. Withdrawal of Complaint to the Commissioner. A request by the complainant to withdraw a complaint filed with the commissioner shall be given substantial weight. The commissioner shall make the final determination if a complaint and subsequent investigation will be terminated.

Section 5. Arbitration or Other Agency Proceedings. (1) A complainant may pursue grievance arbitration proceedings in collective bargaining agreements while requesting relief from other agencies such as the National Labor Relations Board.

(2) The commissioner's jurisdiction to receive KRS 338.121(3) complaints, to investigate, and to determine if discrimination has occurred shall be independent of the jurisdiction of other agencies or bodies.

(3) The commissioner may investigate and issue citations against any party found in violation regardless of the pendency or determination of other proceedings.

(4) If a complainant is pursuing remedies other than those provided by KRS 338.121, the commissioner's determination and deferral to the results of the proceedings may be postponed.

Section 6. Investigation of Complaint to the Commissioner; Issuance of Citation; Notice to Parties; Right of Review. (1) Upon receipt of a complaint under Section 2 of this administrative regulation, the commissioner shall cause an investigation to be instituted. The investigation shall be completed and the commissioner's determination issued within ninety (90) days, absent extenuating circumstances.

(2) If the commissioner finds a violation of KRS 338.121, he or she shall issue a citation and recommend a penalty. The citation shall include a determination by the commissioner as to the merits of the alleged violation.

(3) Notice of the determination shall be given to all affected parties.

(4) If the commissioner determines there has not been discriminatory action, the complainant shall be notified of his or her rights of review of the determination.

(a)1. The complainant may petition the secretary for a review of the determination.

2. The petition shall be in writing and state reasons why the review is requested.

(b) The secretary shall affirm the determination or remand it to the commissioner for further investigation.

Section 7. Employer Contest. A citation and notice of proposed penalty shall state that it shall be deemed the final order of the Review Commission and not be subject to review by any court or agency unless, within fifteen (15) working days from the date of receipt of the notice, the employer notifies the Commissioner of the Department of Workplace Standards in writing that the employer intends to contest the citation and notification of proposed penalty before the Review Commission. Within seven (7) days of receipt of contest, the commissioner shall forward copies of the citation and proposed penalty and notice of contest to the Review Commission.

Section 8. Proposed Penalties. (1) If a citation is issued, the commissioner shall notify the employer by certified mail of the proposed penalty established in KRS 338.991.

(2) The commissioner shall determine the amount of a proposed penalty, based on the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(3) Penalties shall be proposed with respect to an alleged discriminatory act even if the employer immediately abates, or initiates steps to abate, the alleged violation. (13 Ky.R. 1398; eff. 2-10-87; TAm eff. 8-9-2007; TAm eff. 9-8-2011; 42 Ky.R. 113, 682; eff. 10-2-2015.)